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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

JACOB ANDREW BAIZA,

Defendant and Appellant.

D074430

(Super. Ct. Nos. JCF000265,
JCF000462)

APPEAL from a judgment of the Superior Court of Imperial County, Poli
Flores, Jr., Judge. Affirmed.

Sheila O'Connor, under appointment by the Court of Appeal, for Defendant and
Appellant

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney
General, Julie L. Garland, Assistant Attorney General, Scott C. Taylor and Charles C.
Ragland, Deputy Attorneys General, for Plaintiff and Respondent.

This appeal arises from no contest pleas in two separate criminal cases. In one of the cases, Jacob Andrew Baiza was convicted of felony vandalism (Pen. Code,¹ § 594, subd. (a)). At the time of sentencing on that count, without objection, the trial court ordered Baiza to pay victim restitution in the amount of \$1500. Baiza's appeal challenges only the restitution award on the vandalism count. He argues the amount should have been \$1307.87 based on a written repair estimate which was produced at the time of the preliminary hearing, but never discussed at the time of sentencing. Baiza argues his counsel was constitutionally ineffective for failing to challenge the \$1500 award.

Based on the record of the sentencing and the probation officer's report, we will reject Baiza's argument and affirm the trial court's decision.²

FACTUAL BACKGROUND

As part of the agreement, Baiza pleaded no contest to felony vandalism (§ 594, subd. (a)) and misdemeanor battery (§§ 242/243, subd. (a)). The court sentenced Baiza to a term of three years for vandalism, concurrently with a prison sentence in a separate case. In addition, the court ordered victim restitution in the amount of \$1500.

Baiza filed a timely notice of appeal and obtained a certificate of probable cause (§ 1237.5).

¹ All further statutory references are to the Penal Code unless otherwise specified.

² Given the limited nature of the issue on this appeal we will omit the traditional statement of facts.

DISCUSSION

The restitution at issue here involves damage Baiza caused to the victim's tow truck. At the preliminary hearing a repair estimate was introduced in the amount of \$1307.87 for body work to the truck to prove the vandalism met the felony threshold. Later, when the victim told the probation officer that he estimated the costs of repair to the truck would be approximately \$1500. The truck had not been repaired at that time. The probation officer recommended the court order restitution in the amount of \$1500. There was no discussion of the previous repair estimate from the preliminary hearing either in the probation report or at the sentencing hearing. Defense counsel submitted the issue of restitution on the probation officer's report.

A. Legal Principles

Where a defendant has notice of the proposed amount of victim restitution and has an opportunity to challenge the proposed award of restitution, failure to object forfeits the issue of appeal. (*People v. Zito* (1992) 8 Cal.App.4th 736, 742-743.) In this case, Baiza recognizes the issue has been forfeited and therefore argues his counsel was ineffective for failure to raise an appropriate objection.

Where a defendant contends trial counsel was ineffective under the Sixth Amendment, that person bears the burden of proving ineffective assistance and the requisite level of prejudice. In order to establish a Sixth Amendment violation, the defendant must show first that trial counsel erred in the action taken, or in failing to take a particular action. Once the defendant shows error, the person must also show a reasonable probability the defendant would have received a more favorable result in the

absence of the alleged error. (*Strickland v. Washington* (1984) 466 U.S. 668, 687-689.) Where the alleged error is the failure to object or to take action, it is often difficult to determine why trial counsel did not do what appellate counsel now claims was required. Defense counsel has considerable latitude in deciding how to defend a criminal case and in the absence of some indication in the record explaining counsel's non-action, it is difficult for the defendant to prove ineffective assistance. Often the proper procedure to address failure to act is by way of a petition for habeas corpus where reasons for counsel's decisions can be determined. (*People v. Mendoza Tello* (1997) 15 Cal.4th 264, 266-267.)

Section 1202.4, subdivision (f) requires trial courts to order restitution to victims of crime where appropriate. Where the victim has suffered economic loss due to the defendant's criminal conduct the court must require restitution to the victim ". . . in an amount established by court order, based on the amount of loss claimed by the victim or victims or any other showing to the court." (§ 1202.4, subd. (f).) The trial court has broad discretion in setting the amount of restitution and may select any rational method of establishing that amount. (*People v. Sy* (2014) 223 Cal.app.4th 44, 63; *People v. Phu* (2009) 179 Cal.App.4th 280, 284.)

The amount of loss determined by the probation officer after discussion with the victim can be a sufficient basis to set a restitution amount. (*People v. Gemelli* (2008) 161 Cal.App.4th 1539, 1543.)

B. Analysis

Baiza argues the amount of loss was shown by the repair estimate offered at the preliminary hearing to prove the felony level of the vandalism. He contends the trial court should have set restitution in that amount instead of relying on the slightly higher amount recommended by the probation officer. From such premise, Baiza argues the court would have ordered a different amount of restitution if counsel had objected. Of course, the repair estimate was not presented at the restitution hearing, so we assume Baiza contends counsel should have brought the estimate to the court's attention. We are satisfied Baiza has failed to meet his burden of showing counsel was ineffective.

First, we do not know why counsel did not challenge the restitution order. We do know it was calculated in a reasonable manner by the probation officer. We do not know why counsel did not bring the repair estimate to the court's attention.

Even if we concluded counsel should have done something else, there is no reasonable probability on this record that there would have been a different result. The truck had not yet been repaired, thus the actual amount of repair is unknown. Essentially, there are two similar but "competing" estimates in this record. The probation officer recommended the higher of the two based on the victim's statement. On this record, it would be utter speculation to guess whether the court would have selected a different amount. "When there is a factual and rational basis for the amount of restitution ordered, no abuse of discretion will be found." (*People v. Phu, supra*, 179 Cal.App.4th at p. 284.)

In the absence of a showing of ineffective assistance of counsel, we find the challenge to the restitution amount has been forfeited.

DISPOSITION

The judgment is affirmed.

HUFFMAN, Acting P. J.

WE CONCUR:

NARES, J.

IRION, J.